Talbert v. Washington Public Power Supply System, 93-ERA-35 (ALJ Oct. 20, 1995)
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DATE: October 20, 1995
CASE NO. 93-ERA-35

In the Matter of:

ROBERT TALBERT,
Complainant,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Respondent.

Appearances:

Scott Naccarato, Esquire
Critchlow, Williams, Schuster, Malone
and Skalbania
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For the Claimant

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For the Respondents

Before: ALEXANDER KARST, Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Robert Talbert brings this action against his former employer, Washington Public Power Supply System (Supply System) under the whistleblower protection provisions of the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (ERA). He alleges that his employment was constructively terminated in retaliation for his raising a nuclear safety issue on May 16, 1991, and for pressing his concerns thereafter. He calculates his damages to be in excess of one and a half million dollars.

The Supply System is an electrical utility which operates a boiling water nuclear reactor known as WNP-2 at the so called

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Hanford site in southeastern Washington. At times pertinent here, Don Mazur was the company's Managing Director, or chief executive officer, and A.L. Oxsen was its Deputy Managing Director, or chief operating officer. TR 208. Oxsen filled both top posts for about eight months beginning in September 1992. RX ALO-1, p. 1. Heads of departments, among them C. M. Powers, the Director of Engineering, and J.V. Parish, the Director of Operations, reported to Oxsen or Mazur.

Talbert came to the Supply System in April of 1981 as a Senior Nuclear Engineer in the Reactor Engineering Group. Several years later he became the,Group's supervisor. His immediate superior was R. L. Webring, the Technical Services Manager, who in turn reported to the power plant manager, J. W. Baker. Baker reported at various times either to Oxsen directly, or through Parish.

An international consortium of nuclear utilities known as Boiling Water Reactor Owners Group or BWORG, of which Supply System is a member, promulgates Emergency Operating Procedures (EOPs) for the industry. The U.S. Nuclear Regulatory Commission (NRC), which licenses and regulates U.S. nuclear power plants, requires that in emergencies EOPs must be followed unless the operator has prior written NRC dispensation. TR 234.

In early 1991, shortly before a routine annual shutdown or "outage" for maintenance and refueling of the reactor, some reactor operating crews were required to take NRC requalification examinations, which presented a simulated operational emergency called ATWS.[1] TR 203. EOPs directed that in an ATWS emergency, if a turbine is available, both re-circulation pumps be tripped. Several operators flunked the test because they offered other solutions and told the NRC examiners that they considered EOPs mere recommendations. TR 203; 217, 277. Mr. Oxsen testified that to the NRC the notion that EOPs are merely advisory is "blasphemy" which made NRC "very angry" and led it to threaten "to wreak havoc on our company and keep it [shut] down indefinitely while we beat the operators into submission over this issue of procedure compliance." TR 216. The NRC apparently concluded that the Supply System operators' heretical view of EOPs represented a " cultural" attitude which pervaded the entire company, and it proceeded to conduct a general evaluation of its operations. As a result, the NRC flunked so many operators that the Supply System had to obtain special dispensation to continue operations until the outage. The company was at risk of not having enough licensed personnel to restart the reactor on schedule in June 1991. TR 203; Exh. JWB-1, p.2.

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Some of the employer's executives think that Talbert was one of the people who fostered this "cultural" problem. Powers put it thus: "Mr. Talbert had always felt that he had the flexibility to consider [EOPS] procedures as guidelines and not requirements, since he had authored many of them and felt he had the technical

ability to deviate from them.... Mr. Talbert had advised the operator crew to deviate from an [EOPs] during a licensing examination..... RX CMP-l P.2.[2]

With this as background, Oxsen called two meetings to discuss compliance with EOPs. RX ALO-1, p. 2; TR 202, 203. The first meeting, held on May 16, 1991 and attended by about 80 people, was video taped. Oxsen gave a speech in which he explained "what the corporate policy was, and why, and... emphasize[d] how important it was that everybody rigidly follow [the EON], or change them if appropriate." TR 203. He called the EOPs "the Bible" which had to be "considered the law," and alluded to the way EOPs could be changed when necessary. Exh. ALO-3, p. 1. Oxsen was followed by Baker who solicited questions. Baker ended his answer to one of the questions by saying "...Quite frankly, I can't think of anytime that we would deviate from our EON." At that point Talbert said: "I can think of one," and the following colloquy ensued:

> Baker: When's that?
>
> Talbert: It's a trip into Region A with a turbine available ATWS. It's not only wrong, it is very dangerous and germane to reactor safety.
>
> Baker: Then we would need to change that in our EOPs and exercise that in the form of EOP revision and not exercise that in the form of, you know, simulator performance.
>
> Talbert: I am in complete agreement and clearly we will follow the EOPs verbatim. We have a hook in the EOPs currently that is dangerous and germane to safety.
>
> Baker: But that's an issue that is being pursued by the owner's group [BWORG] and the product of that will come out of that.
>
> Talbert: That's true.
>
> Baker: And I'm not sure that we have all of the facts on that, but certainly that's an issue worth pursuing.

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> But, you know, if you are operating over in the plant and this came up, we would want to follow the EOPs.

RX ALO-3.

Oxsen admittedly resented Talbert's comments. He said:

> I was personally disappointed that, given the situation the company was in and the tone we were trying to set in that meeting and the mood of the meeting, that someone would stand up and say, but yet I know a situation where

> you don't have to.... TR 213
>
> * * *
>
> I was not so much concerned about the technical merit of what [Talbert] raised, because there were plenty of people to deal with that below me. I was concerned with the fact that, after delivering a rather long message, reinforced by the plant manager, on the need to comply, and there won't be any exceptions, and all that, that a member of the technical community that was involved in that process would immediately stand up and say, well, I know of an example when you don't have to follow the procedures. That's what I was concerned about.

TR 211-212.

Oxsen allowed that he may have conveyed his irritation with Talbert to his subordinates, but he denied that he ever Instructed anyone to discipline Talbert. TR 221, 222. And there is no allegation of any adverse action against Talbert during the rest of 1991.

Talbert's diary recorded that nearly a year a half later Webring told him that his remarks were resented because the reactor operators thought Talbert "was the smartest guy in the world.... and if [Talbert] thought the EOPs were inadequate, it would make them feel the same." CX 3. Webring told Talbert that he should have raised the ATWS issue not at the meeting called to demand compliance, but do it at an opportune time, quietly and privately. CX 3.

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The Supply System's position in this case appears to be that Talbert's comments on May 16 were not resented because they raised a safety issue which management wanted to ignore,[3] but because Talbert's comments, coming from a man with a reputation as a brilliant engineer who was the titular or former head of the key Reactor Group, undercut Oxsen's and Baker's efforts at the meeting to change the company "culture" and "beat the operators into submission over this issue of procedure compliance." TR 216.

In the fall of 1991 Talbert wanted more free time to study for an upcoming professional engineer examination in another field of engineering, and he asked Webring to be temporarily relieved from his supervisory duties. TR 116-17. On October 11, 1991, Webring agreed that for one year Talbert could switch jobs with Dale Atkinson, a staff engineer in his Group. RX RWL-5. However, when the so called "sabbatical" year ended, Webring informed Talbert that he could not have his old job back. Ostensibly because of a concern that Talbert's continued employment in his group in a demoted status might prove awkward,

his superiors decided that Talbert should leave the Reactor Group altogether, but be retained by the company. RX RWL 10, p. 1. However, Talbert appears to have concluded that no reasonable position would be offered to him, and that any future promotions within the company were out of the question. He resigned on November 30, 1992, the day he learned that Mazur left the company and that Oxsen, whom Talbert perceived to be his nemesis, took over. Talbert alleges that his resignation under these circumstances was a constructive termination of employment. He testified that although he was given other reasons for his termination, when explaining their action, his superiors made repeated references to the May 16 meeting. Thus, he believes that his comments on May 16, 1991, and his subsequent pressing of the same ATWS safety issue, were the real reasons for his termination. Talbert also charges that the employer engaged in other conduct which amounted to harassment of him, and which, he says, confirms the employer's malevolent and discriminatory attitude towards him. Specific allegations will be discussed below.

The law applicable to this case is summarized in *Dartey v. Zack Company of Chicago*, 82-ERA-2 (Sec'y Apr. 25, 1993) slip op. at 7-9:

> [T]he employee must initially present a prima facie case consisting of a showing that he engaged in protected conduct, that the employer was aware of that conduct and that the employer took some adverse action

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> against him.[4] In addition, as part of his prima facie case, "the plaintiff must present evidence sufficient to raise the inference that . . . protected activity was the likely reason for the adverse action." *Cohen v. Fred Mayer, Inc.,* 686 F.2d 793 (9th Cir. 1982). . . . If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons.

Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. . . . If the employer successfully rebuts the employee's prima facie case, the employee still has 'the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. . . . [The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' . . . *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) at 256. The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee has proved actionable retaliation for protected activity. Conversely, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a

preponderance of' the evidence. Id. at 254-265. Finally, the trier of fact may decide that the employer was motivated by both prohibited and legitimate reasons, i . e., that the employer had 'dual motives.'

> ... [I]f the trier of fact reaches the latter conclusion, that the employee has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, the employer in order to avoid liability, has the burden of proof or persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. (Citations omitted.)

A recent decision raised the employer's burden from a preponderance to "clear and convincing" evidence. *Yule v. Burns International Security Service,* 93-ERA-12 (Sec'y May 24, 1995).

Two preliminary observations about this case are in order. First, it should be noted that the admitted termination of

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Talbert's employment in the Reactor Group without his consent, even in contemplation of a reassignment, was an adverse action affecting the terms and conditions of his employment. Such a termination, if done in retaliation for protected conduct, would appear to be sufficient to support a charge of discrimination. Second, the unusual situation presented in this case deserves noting. In a typical whistleblower case the employee complains to the authorities or his superiors about his employer's improper or illegal conduct, the employer takes umbrage and retaliates. However, in this case the employee has not blown the whistle on his employer's improper conduct. The protected conduct on May 16, 1991 asserted here, was a bona fide discussion about what was the safest course in a hypothetical emergency. Underlying it is a broader issue which plagued the Supply System and its relations with the NRC, i.e., whether the reactor operators on duty should have discretion how to handle emergencies, or must follow EOPs. The Supply System concedes that Mr. Talbert's conduct on May 16 was protected, presumably because it feels that any discussion of safety or a challenge of an employer in the name of safety is protected. And since the admittedly protected discussion of May 16 and Talbert's later efforts to press the same point were obviously known to the Supply, System, the case turns on whether the resentment of Mr. Talbert's admittedly protected conduct was the real reason why his employer took the alleged adverse actions against him.

Time of decision to terminate Talbert's employment in the Reactor Group

Mr. Talbert avers that the decision to terminate him as the Reactor Group supervisor was made in the early months of 1992 and not in the fall of 1992 as respondents say. Talbert testified that when he missed the deadline for the planned examination, he

asked Webring for his job back first in January and again in April of 1992. He says Webring gave evasive responses or stalled until October 1992. But, Talbert says, after he left the company he learned from unnamed sources that Webring told Atkinson in January of 1992 that Atkinson would be the permanent Supervisor of the Reactor Group. TR 120.

Webring maintains that when Talbert initially asked him to abort the "sabbatical," he could not do it because the job was promised to Atkinson for an entire year, and that he decided that Talbert should leave the Reactor Group in October 1992.

There is circumstantial evidence corroborating Webring. He gave Talbert two good performance appraisals after the May 16

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meeting. In the second appraisal, dated September 17, 1992, Webring wrote that Talbert "needs to consider [some self-improvement suggestions] as he re-enters the management process." RX RWL-3a. I take that phrase to indicate that as of September 17, 1992, Webring expected Talbert to return to his supervisory post shortly thereafter. Also, in September of 1992 Talbert received a 4.2% merit salary increase ($2,773.00) presumably with Webring's blessings. These acts are inconsistent with the notion that Webring decided to demote Talbert in early 1991 and was waiting for an opportunity or an excuse. Webring's explanation of why he could not switch Talbert back when first asked strikes me as inherently credible, and Webring struck me as a generally credible witness.

Having weighed Talbert's hearsay from an uncorroborated source on the one hand, and the credible countervailing evidence on the other, I find that Webring's decision to terminate Talbert was not made until the fall of 1992.

Employer's reasons for Talbert's termination from the Reactor Group

The controlling question posed by this case is whether the decision to terminate Talbert was motivated, in whole or in part, by his protected conduct. I accept Talbert's testimony that the May 16 episode was repeatedly mentioned by his superiors when explaining his demotion. I also find that some of his superiors, notably Oxsen, concluded, partly on account of Talbert's comments at the May 16 meeting, that he lacked some qualities they thought a good manager should have. But that does not end the inquiry.

Webring testified that Talbert's conduct at the May 16 meeting was an example of his "poor selection of timing when he brings tip issues, how he addresses issues, and how he relates to people," but was not a "major consideration" which led to his termination. TR 261. The employer contends that on May 16 Talbert raised a proper question, but before the wrong audience, at the wrong time, and in a wrong way. It argues that if Talbert was really concerned about the AWTS problem, he should have asked for an EOPs amendment by filing a so called PER (Problem Evaluation Report) which every employee had a right to initiate.

TR 71, RX RLW-2. As Talbert's superiors saw it, Talbert's raising of the ATWS issue on May 16th showed poor judgment because it was obviously at cross Purposes with the management's attempt to persuade the crews to follow EOPs. The executives concede that it was one of the incidents which led them to conclude that Talbert had neither the broad vision nor the

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temperament for the subtleties of management, that he did not know when to talk and when to keep quiet, and that he lacked tact, prudence and diplomacy when dealing with regulators and other managers. Talbert's superiors testified, in effect, that their judgment about his fitness for managerial positions was based on their long term evaluation of him, and was not formed merely on the basis of the May 16 meeting. Respondent argues that the company top echelon's view of Talbert, although in part based on the May 16 incident, does not raise an inference that he was terminated because of his protected conduct on May 16. Respondent avers that Talbert was terminated Long after May 16, 1991, when, due to other events, it became imperative that the supervisor of the Reactor Group have a fundamentally different attitude to EOPs from Talbert's, and be more deft in dealing with other groups in the company than Talbert had been.

There is credible evidence tending to corroborate that events apparently unrelated to the May 16 episode played a role in leading Talbert's superiors to the conclusion that he lacked good managerial judgment and was unskillful in dealing with other groups. For example, Talbert's 1991 and 1992 performance appraisals indicate that Webring and Baker felt that Talbert did not know how to delegate work to his subordinates, "maintain a broad perspective," or "communicate effectively."[5] RX RLW-3, RLW-3a. Talbert's prudence was criticized in the fall of 1991 by Oxsen himself when Talbert hired one of two competing in-house applicants for a job within his department, but wrote the following comment in the company personnel files:

> Bill [the rejected applicant] is the clear candidate of choice. Due to current staffing in the Operations Department, Bill is precluded from changing positions. Bill has all the attributes necessary to be a SUPERB STA. He has a surfeit of attributes beyond the minimum required. I lament the fact that he is precluded from joining the Reactor Engineering Group. He would have, assuredly, distinguished himself!

CX 14. Oxsen commented: "This is vintage Talbert. [sic] One document selecting George followed by another editorial stating Bill was the preferred choice. Not a good package for the file." The phrase "vintage Talbert" implies that Oxsen thought that Talbert's gaffe was not singular. Baker echoed Oxsen in a note to Talbert: "Even though you mean well - your words do have an impact - poor 'supervisory' judgment on your part..... CX 14. Webring also testified that Talbert lacked the skill to point out mistakes made by the Fuels group without creating resentment.

The Supply System's basic contention is that the decision to remove Talbert from the Reactor Group was made after, and as a result of, a very dramatic event, viz., a reactor core oscillation which occurred on August 15, 1992. While the reactor was successfully shut down and a physical catastrophe averted on that day, the event (which incidentally was not due to an ATWS) "shook up" the whole nuclear power industry, and was a business disaster for the Supply System. TR 43. It multiplied the company's previous troubles with NRC, created serious internal turmoil, and indeed put the very existence of the company at risk. TR 43, 288-89. Powers described it as the central episode in the recent history of the Supply System, which "dominated much of management's attention..., characterized the tone with which [the Supply System] dealt with [NRC] for a long period of time... and [which]...ha[d] not yet completely been resolved" at the time of trial two years later. TR 288. Sam McKay, a witness called by Talbert, testified that after the event the situation in the company became very "volatile," the whole approach to management changed, and changes were promulgated by the company's "Executive Board." CX 17, pp. 16, 17, 20. It is clear that the company came under severe pressure from NRC. Its executives struggled to find the root of the problem which led to the oscillation; to find out who was responsible; how to discipline them; and how to prevent a repeat. The record documents or hints at profound corporate soul searching,, collective self-criticism, even self-imposed fines among the executives. There was testimony that various managers were disciplined in unspecified ways, and respondent's closing brief says that some executives were fired.[6] Mazur's departure came shortly after the core oscillation. RX ALO-1. And by the time of trial, neither Oxsen nor Powers were with the company any longer, and Baker and Webring held different jobs. While there is no evidence about the circumstances of Mazur's or Oxsen's departures, or the reassignment of Baker and Webring, Powers admitted that he was forced to resign on account of the oscillation. TR 287, 288. The event also brought to a head the issue of compliance with EOPs, for the NRC decided that the company's casual view of EOPs was one of the causes of the oscillation.

The most compelling explanation of the reasons for Talbert's termination came from the man who actually made the decision, Rod Webring. He testified that the decision was his alone; that he was not at the May 16, 1991 meeting; that Talbert's statements that day did not influence his decision; and that neither Baker nor Oxsen directed his decision. TR 255-56. Because Webring's testimony about the events which led to Talbert's termination

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lies at the crux of the respondent's explanation of the company's action, it is recited at length:

> ... Bob [Talbert] was the Shift Nuclear Engineer on duty during the [reactor oscillation] event.... The event had a profound impact on Bob. Immediately following the event I was called from my home to the

Plant. When I entered the Control Room I could tell that Bob was visibly shaken. He mentioned several times that he had made a mistake and that it was all his fault. At that time we did not know why the event had occurred. Bob was in no position to render assistance and, after obtaining a relief, Bob was sent home.... A root cause analysis was conducted... [and] provided to the NRC.... The report identified that Bob's actions contributed to the event. There were multiple factors which caused the event, and no one individual was solely responsible....

The Supply System was criticized for having a procedural environment which permitted Bob's action-s during the oscillation event. Basically, our procedures permitted an amount of discretion in determining operational parameters. The NRC felt that discretion should be curtailed, and more specific operational guidance provided. Generally speaking, the NRC was of the opinion that the event would have been avoided had our procedures required more specific operational parameters.

Bob was not a strong proponent of placing procedural restrictions on core management decisions made by operators. Bob operated well when given general boundaries and guidelines. The core oscillation event emphasized the need to rely on procedures as strict controls.

In order... to address the regulatory and operational concerns, the Supply System needed to shift its emphasis away from reliance on individual contributor expertise and on to procedures that could be uniformly interpreted and applied by all staff ....

It is important to understand that the core oscillation event was extremely significant in terms of its potential to adversely affect the viability of the Supply System ....

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[T]he core oscillation event prompted a re-examination of the manner in which Fuels Engineering and Reactor Engineering discharged their independent responsibility for the reactor core. Fuels Engineering designs the reactor core. Reactor Engineering then operates the reactor within the operating margins of the core design. There is an inherent tension between the two functions, as economical core designs reduce operating margins. The core oscillation event demonstrated a need for closer cooperation between the core design and operation functions in order to strike a balance between design and operation issues.

I did not believe that, in the time available to us, Bob could work with Fuels Engineering in an effective fashion to achieve the results necessary for the Supply System's continued viability.

... There was simply too much history between Bob and Fuels Engineering. The core oscillation event exacerbated the already strained relationship between Bob and Fuels Engineering.... We had to be of one purpose, and perceived as a company unified in that purpose.

I recognized that Bob was not solely responsible for the relationship with Fuels Engineering. However, I became convinced that with the existing relationship between Bob and Fuels Engineering, we would not be capable of moving the Reactor Engineering organization to our new operational philosophy within the available time.

I was not in a position to effect a change in Fuels Engineering and determined that it was appropriate to take action within my area of responsibility to effect a necessary change.

... Among other matters, I decided not to return Bob to the Reactor Engineering supervisor position. Under all the circumstances, I felt that Dale [Atkinson] was the best talent available to the company for the task at hand.

... [M]y decision evolved based on my experience with Bob, his management style and the challenges facing the company, most critically in the area of core management

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which included Fuels Engineering and Reactor Engineering.

These challenges had become more acute as a result of the core oscillation event. It was necessary that changes occur in the methods used to manage this critical function. There was no room for organizational differences to affect the outcome. At that time, the viability of the company was at stake.

Bob's previous relationship with Fuels and his involvement in the core oscillation event would have created difficult barriers to overcome in successfully managing this critical function.

RX RLW-1, pp. 7-9.

Although Powers was not in the chain of command over Talbert, because he was privy to the decision to move Talbert, I find his testimony also significant. He said:

> ... [The] power oscillation event occurred at WNP-2 while Mr. Talbert was still working as a reactor engineer. In this capacity, Mr. Talbert had made a decision about the rod pattern distribution and rod withdrawal sequences which was later determined to have been the root cause of the power oscillation event.
>
> After the oscillations, the Supply System began preparing for its meeting, with the [NRC], aware that an issue the NRC felt strongly about was accountability for this event. Consequently, as an element of the Supply System's response, disciplinary actions were taken with everyone involved, including Mr. Talbert. Mr. Talbert reacted strongly to the discipline, feeling that he had been unfairly blamed for the situation. It was also decided at that time, that Mr. Talbert would not be returned to the supervisory position in Reactor Engineering. This decision, however, reflected more than just his role in the power oscillation event; it also took into account how he had acted in certain interactions with the NRC as he supported the operator licensing examinations. More specifically, Mr. Talbert had always felt that he had the flexibility to consider [EOPS) procedures as guidelines and not requirements, since he had authored many of them and felt he had the technical ability to deviate from them. This belief directly contributed not only to power oscillations,

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> but also to the failure of one operator crew during NRC requalification exams. Mr. Talbert had advised the operator crew to deviate from an [EOPs] during a licensing examination. The NRC then failed the crew on the exam as a result of this action. Mr. Talbert's portrayal of this type of image became increasingly more difficult to justify as the NRC's concerns with procedural compliance escalated.

RX CMP-1, pp. 1-2.

Both Webring and Powers struck me as credible witnesses. Although Powers put more stress on Talbert's role in the oscillation event as a factor in his termination, the discrepancies in Powers' and Webring's narratives appear to be more due to differences in perceptions or emphasis than substance. To the extent they are at odds, I give greater weight to Webring because he actually made the decision.

Talbert himself lends some credibility to Webring's explanations. Talbert readily admits to longstanding friction between himself and the management of Fuels which he attributes to Fuels' mistakes which he caught with some regularity. But whatever the causes of the friction between the Reactor and Fuels groups, its admitted existence, and the conclusion that it played a role in bringing on the oscillation, when viewed against the background of the festering debate over whether EOPs are mandatory or advisory, give Webring's explanations a truthful ring. I find it significant, also, that before the parties were

in the thrall of litigation, Webring wrote Talbert a memorandum in which he explained his reasons for terminating him much as he did at trial. He cited Talbert's past problems with the Fuels group and wrote that "[t)he most compelling reason for change is that the [Reactor] group needs to develop its programs and procedures and the reliance on these instead of total reliance on a few 'wizards'." RX RLW-10, p 1.

The sequence of events reinforces the credibility of Webring's explanation. Talbert does not allege any adverse action against him until six or seven months after the May 16 meeting, and I assume there was none. A delay that long appears unlikely if the irritated Oxsen or his lieutenants were inclined to retaliate. On the other hand, five months after the May 16 meeting, management treated Talbert with consideration, not to say kindness, by allowing him to decrease his work load and responsibilities but keep his previous salary. He was also given a substantial merit pay raise, and two good performance evaluations. These are hardly actions of an employer bent on

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denoting or getting rid of a troublesome employee. Apart from Talbert's suspicions, and the hearsay that Atkinson was told in early 1991 that his promotion was permanent, I find no indication in this record that the Supply System took or was contemplating taking any adverse action against Talbert prior to the core oscillation event.

Talbert's allegation that he was terminated because he raised the ATWS problem appears to be based on his Surmises and his interpretations of conversations relating to his termination. He did not testify that the May 16 episode was explicitly cited as either the, or a, reason for his removal. While I accept that May 16 was repeatedly mentioned as Talbert says, I rather think that Talbert misconstrued what he heard when he pressed his superiors to explain his termination. Even viewed through the prism of Talbert's own diary entries, the references to the May meeting appear to me to have been made to illustrate diplomatically why management judged him maladroit and unsuited for jobs requiring broad perspectives or diplomacy. Taken in context, I infer that the managers' references to the May 16 meeting were offered by way of saying that the company did not want to get into more trouble with NRC by having as one of its spokesmen an avowed advocate, indeed perhaps the principal exponent, of a view that EOPs are advisory. Implicit in their explanation was management's concern that Talbert, who "had no political bone in his body," was so frank and outspoken, not to say indiscreet, and so focused on technical issues at the exclusion of broader considerations, that he might press his view of EOPs when dealing with the NRC and thus bring on more troubles for the company.

While it is a close question, on balance I find that Mr. Talbert did not present sufficient evidence to raise an inference that he was constructively terminated on account of his protected conduct on May 16. But in any event, I am firmly of the opinion that he did not carry his ultimate burden of persuasion that his

termination was due to his protected conduct. The direct and circumstantial evidence that the decision to remove Talbert from the Reactor Group was not related to his May 16 comments, or his later pursuit of the ATWS problem, outweighs the countervailing evidence. On balance, I am persuaded that Webring's stated reasons for removing Talbert from the Reactor Group were his and the company's real reasons, and that Webring and the company were motivated by proper, legitimate, nondiscriminatory considerations vital to the company's future. It need not be decided here whether the company's perceptions of Talbert were justified, or that their stated reasons were sufficient to warrant his removal.

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Suffice it to say that the company's motives were legitimate, sincere, and not pretextual.

Webring's veto of Talbert's transfer to MWIP

Mr. Talbert charges that the earliest discriminatory action taken against him on account of the May 16 meeting occurred in late December of 1991 or early 1992. He says he was precluded from switching to another job within the company in the Megawatt Improvement Program (MWIP). CX 16, p. 11-12. Webring admitted that he vetoed the proposal. He said that by company custom, as Talbert's manager he had a right to veto an intracompany transfer. He did so because he needed Talbert, who was one of only a few people qualified to be a Shift Tech Advisor, a vital 24-hour-a-day, seven-day-a-week job. Webring said he did not "have the freedom...at that point in time to turn [Talbert] loose." TR 264. 1 find this explanation credible, and Webring's action consistent with what he did in October of 1991. 1 find Webring's stated reason for rejecting the transfer to be legitimate and non-discriminatory.

Refusal to transfer Talbert to the Engineering Department

Talbert started a diary in late 1992 to document events or conversations which he thought pertained to the company's actions against him. This diary and his direct testimony show that after Webring told him on November 3, 1992 that he had to leave the Reactor Group, the head of the Engineering Department, Chris Powers, approached him and tentatively offered him several jobs in his department, notably one in Severe Accident Management, which Talbert wanted. TR 132-33. But the next day, according to Talbert's diary, Baker told him that although he (Talbert) was technically very strong and "told the truth," he was "Perceived as a loose cannon by upper management" because "he did not have a political bone in his body." In addition, after mentioning the May 16 meeting, Baker told him that upper management would not allow Talbert to take any of the jobs mentioned by Powers. Talbert's diary also recorded Baker saying that he would not be considered for any position in which he would have to deal with the NRC, NIPO, the executive board, owners' groups, or upper level management because of a concern that he was indiscreet and might let something slip that might "harm the Supply System's image." TR 134-135; CX 3, pp. 3-4.

Approximately two weeks later, Powers told Talbert again that he wanted Talbert to take the Severe Accident Management job, but they agreed that he (Powers) would check whether Oxsen

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or Baker had any objections. TR 144. Talbert's diary records that two days later, Webring told Talbert that what Baker told him on November 4 was true, and that he (Talbert) would never be placed in a management position. TR 145. Talbert testified that when he did not hear from Powers when he expected to, and then learned that Mazur was leaving the company and that Oxsen would be the sole top executive, it became "pretty clear to [him] at that time,... that there was not going to be a reprieve from the interdictions regarding [his] job and job capabilities, and that the Severe Accident Management EOP job that [Powers] had offered was probably not in [his] future." TR 146. In this frame of mind, he wrote a handwritten note of resignation to Webring on November 30, 1992. TR 146-47; 177-78. Shortly thereafter he was hired by another employer and started his new job while on terminal leave with the Supply System.

Webring's testimony about relocating Talbert is as follows:

> ...I told Bob that I was under no time pressure to effect his transition out of Reactor Engineering, and that there would be adequate time for him to find another position within the Supply System....[7]
>
> Bob had a lot to offer the Supply System. In my mind it was simply a matter of determining where we could best utilize his talents and where Bob would feel that he was able to make a contribution.... Given Bob's technical abilities and high salary, however, it was possible that a position would have to be found in another organizational component. I first contacted Jack Baker.... Jack contacted Lee Oxsen and Chris Powers.... I was informed by Jack that several positions were available to Bob, and that Chris would be talking with Bob about the positions.... In addition to meeting with Chris, Bob had requested to meet with Jack and me to further discuss his removal from the Reactor Engineering supervisor position.
>
> During this discussion, Jack told Bob that Jack did not feel that he could support placing Bob in a position requiring Bob to serve as the company spokesperson. I believe the context of this conversation was in relation to alternate positions for Bob that might be available within the Plant under Jack's control. Jack indicated that this extended to interfacing with the NRC as a company representative.

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Jack made it clear that Jack was not restricting Bob's

> ability to communicate with the NRC with regard to expressing nuclear safety issues.
>
> .... This was not a new message for Bob. The message may have been delivered in too frank a fashion for a person of Bob's prideful nature to accept.... Jack, Bob, and I were addressing alternate employment only within the plant. It was Jack's and my goal, to find suitable alternate employment for Bob within the Supply System.... The only reason that Bob is not working for the Supply System now was his decision to quit.... On December 4, 1992, 1 received a supplemental resignation letter from Bob.... Bob mischaracterizes the conversation between he and Jack. [sic] Bob was told that Jack would not recommend Bob for a position where Bob would represent the Supply System with the NRC.... Neither Jack or I had veto power over the jobs that Chris offered Bob. Chris could use Bob in any capacity, or under any terms Chris deemed appropriate....

RX RLW-1, pp. 7-12.

Baker confirms that he told Talbert that he (Baker) could "not support him" for jobs in which he would be a company spokesman either inside the company or with vendors or regulators. TR 232-33, 24 1; RX RLW- 1, p. I 1. However, Baker denied that there was a decision made to never promote Talbert. He said he knew that Powers wanted Talbert for the Engineering department and that he had no objections since Powers was willing to provide special "oversight" of Talbert. TR 246.

Powers' testimony about the attempts to relocate Talbert is consistent with Webring's and Baker's and is credible. He testified that after the oscillation event, the executives who were deemed responsible for it, himself included, were disciplined. In meetings where discipline was discussed, the managers concluded that it would be in the company's best interest to retain Talbert because the company needed his scientific talent.[8] But Powers, and apparently others, felt that Talbert's "approach at times made him less effective because of interface problems with people, and that Talbert "tended to have a single approach to problem solution and it was all based on technical arguments, and many times effective decisions are made in other ways." TR 277-78. Therefore the executives wanted to move Talbert to a job in which his gifts could be utilized but

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where his shortcomings could not hurt the company. Powers undertook to find Talbert such a job in his department. To this end, Powers went to the trouble of driving to the plant on the evening of November 2, 1992 to talk to Talbert, who was on duty. They discussed three positions, and Talbert appeared to be keen on the Severe Accident Management Job. When Talbert expressed concerns about restrictions which might be imposed on his career by other executives, Powers said he would talk to them. He

testified that in subsequent discussions with Oxsen and Baker, he learned that neither objected to Talbert's move to Engineering. Powers said that he got the impression that there was a consensus that Talbert was a good engineer, that "his interface skills needed some development work, but that there were no limitations as far as his success in my organization...." TR 279. However, according, to Powers, when he tried to tell Talbert that there were no obstacles to him moving over to Engineering, Talbert had already submitted a resignation letter, and could not be reached. Powers did not try to contact Talbert at home. TR 285-86.

Talbert argues, at least by implication, that the fact no one tried to reach him at home to tell him about his clear path to Engineering indicates that the discussions were a sham. This argument has some force, and has given me pause. But on balance, given the unequivocal tenor of his resignation note, and all the other circumstances, I am not entirely surprised that Powers did not try harder to find Talbert by contacting him at home and press him to change his mind.

Talbert's initial handwritten notice of resignation, addressed to his immediate superior Webring, said his decision was final and that he did not want to talk with any one any more. He wrote:

> The decision was very brutal to make, enormously hard and very stressful. Out of respect to my unbridled dedication, my technical excellence, and years of contributions far beyond the domain of my job, please don't ask me to discuss my decision or to talk to me about my future.

RX RLW-11

The record suggests that when Talbert resigned, most of the top executives, including Powers who was eventually forced out, were quite busy trying to protect or salvage their own careers, and thus might not have pursued Talbert as diligently as they might have in better times. I note also that about that time, on

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December 2, 1992, Talbert threw down the gauntlet to management by filing this action, charging them with ignoring safety and discriminating, and threatening other legal actions. RX RLW-13. This doubtless did not endear Talbert to the company managers who were already beset with many other troubles, and was not likely to motivate them to go out of their way to find him and talk him out of resigning. Given all these circumstances, Powers' failure to contact Talbert at home does not persuade me that he acted perfidiously or that the job discussions were a sham.

Lastly, I note that what the company's managers did after Talbert resigned is not directly relevant in this action. The issue here is whether Talbert was terminated on account of protected conduct. The constructive termination occurred on November 30 when he resigned. The company's actions thereafter

are germaine only to the extent that they may shed light on the employer's motives for the termination. I do not find that the lack of zest in pursuing Talbert after he resigned, Under all the prevailing circumstances, sheds any light on the company's motives.

On balance, I find that Mr. Talbert has failed to show by a preponderance of the evidence that the discussions about other jobs were a sham, that his transfer to the Engineering department was blocked, or that the company decided he could not move up in a new post. TR 205-06, 214-15, 232-33, 243, 268, 272, 277. I am persuaded that because the company believed that Talbert was a gifted engineer who was valuable to it, it decided to relocate him to another job in the Engineering Department which appeared to be acceptable to Talbert.

Refusal to run a computer study on Talbert's hypothetical cases

Mr. Talbert testified that it became clear to him after the oscillation event that because of its unstable core, WNP-2's situation was different from that of other reactors and that WNP-2 could have a "prompt critical event" in an ATWS situation if the EOPs were strictly followed. It appears that there was a consensus that there might be a unique problem with the stability of WNP-2's core. TR,35, 45-50. Although Talbert did not file a PER on the subject because he says he did like not PERs, he pressed his ATWS concern in other ways. TR 121-24, 142. To that end, he prepared two hypothetical scenarios for computer analysis by Siemens, the supplier of the nuclear fuel, by what is called a STAIF code.[9] TR 122. The two hypothetical cases dealt with the ATWS issue which he raised at the May 16, 1991 meeting. TR 180.

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William Burke, Talbert's colleague in the Reactor Engineering Group, testified at Talbert's behest. He said that he was responsible for preparing the tapes for analysis at Siemens, and that at Talbert's request, he added Talbert's two hypothetical cases to the tape. TR 33-34, 37, 56-59. According to Burke, the head of the Fuels Group, a Mr. Whitcomb, who had the final say on which cases were sent to Siemens for analysis, decided that Talbert's two cases would not be sent to Siemens because "the Supply System was not interested in the results of those cases." TR 40. Burke speculated that this may have been because one possible answer to Talbert's hypotheticals might have compelled a plant shut down. TR 73-75.

The impact of Burke's testimony was diminished by his admission that all the cases actually submitted to Siemens dealt with possible problems during start up, while Talbert's two hypotheticals dealt with events during normal operations. Burke also allowed that the answers to the hypotheticals posed by Talbert were obvious to the engineers, and that the Siemens study would have merely provided calculations confirming the obvious

answers. TR 88. Moreover he said that Talbert's hypotheticals were "...something we didn't anticipate really ever happening." TR 89.

There was much rather technical testimony, as to what is a "credible" event, which is to say one within the realm of probabilities, and what is "incredible." The illustration of a credible event is the mathematical probability of a person being struck by lightning. Suffice it to say here that the hypotheticals posed by Talbert were viewed by some as "incredible," which is to say likely to occur in 1000 years of reactor operation. Talbert took great pains to show that because the occurrence would have been cataclysmic, he pursued the ATWS question even after he left the Supply System. He points out that the NRC and BWORG devoted much time and money to the questions he posed, which proves that his hypotheticals were no mere pipe dreams, or rather nightmares. Regardless of whether Talbert's hypotheticals were in engineers' parlance "credible" or "incredible," I have no doubt that Talbert raised serious questions which the NRC took seriously, and which his superiors later decided should be addressed. CX 3. However, this conclusion does not raise an inference that the company's refusal to have Talbert's hypotheticals run through Siemens' computers amounts to discrimination against him. Nor does it bespeak otherwise improper conduct by Supply System. Several considerations are decisive to my mind.

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Burke and a colleague were apparently working day and night preparing the hypothetical tapes so that the shut down reactor could be promptly started up. Since the company's immediate object was to restart the reactor, and since the oscillation event occurred during startup, I do not find it inherently unreasonable that the company was not then inclined to run tapes on problems, however real, which might arise during normal operations. What's more, Talbert presented no evidence to indicate that whoever rejected his hypotheticals, presumably Whitcomb, knew that the-rejected questions were posed by Talbert. If Whitcomb knew Talbert was the author of the two ATWS hypotheticals, there is at least a question whether Whitcomb's act can be charged to the company, rather than be viewed merely as evidence of the discord between Talbert and Fuels management. Moreover, in as much as Talbert's hypotheticals posed questions the basic answers to which were apparently obvious in any case, I conclude that Whitcomb's veto of running these hypotheticals is not evidence that the company was discriminating against Talbert, or trying to hide a safety problem. It is not inconceivable that Whitcomb or others may have decided that Talbert wanted his hypotheticals run so that he could make a personal point that he was right on the ATWS issue he raised on May 16. Lastly, there is evidence that Talbert's superiors in the end did agree to run Talbert's hypotheticals. CX 3. See below.

For these reasons I am compelled to find that the company's initial refusal to run Talbert's hypotheticals was not a

discriminatory act.

Misrepresentation of Safety Discussions with Powers

Talbert alleges that on December 11, 1992, which is to say after his resignation and after he filed his whistleblower complaint on December 2, 1992, he had a conference with Parish wherein they discussed Talbert's safety complaints and allegations. Talbert's diary entry about that meeting shows that, even though Parish had a copy of Talbert's discrimination complaint in his hand, they still spoke about moving Talbert to another job in the company. Talbert's diary records that he complained about the removal of his hypotheticals from the Siemens tape, and that Parish said he would have the hypothetical studies run. CX 3. Parish's memorandum to the file said:

> At a meeting held on December 11, 1992, Mr. Bob Talbert, Lead Plant Technical Engineer, announced his final decision to resign from his position at the Supply System. Based on the discussions at this

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> meeting, it is the understanding of the Supply System that Mr. Talbert has no safety concerns with the current operation of WNP-2. His concerns regarding the long term issues associated with Reactor Stability are being addressed by the BWR Owners' Group.

CX 10, p. 3. Talbert protested in writing the accuracy of Parish's memorandum and explained his ATWS concern again. CX 10. I do not find the misunderstanding of the import of the meeting to be an indication of anything sinister. Parish's memorandum merely said that Talbert's concerns were not about current operation of the reactor, but about long term issues which were before BWORG: This brief summary of the conversation which Talbert's diary describes at length does not strike me as being so inaccurate as to suggest it was deliberate. That and the fact that the memorandum lists Talbert among the recipients of copies persuades me that the apparent miscommunication was innocent. I have to conclude that Talbert has not carried his burden of showing that this event had some discriminatory aspect related to this action. Moreover, since the alleged events occurred after Talbert's resignation, they are not really germane to this case.

Editing of the video task of the May 16 meeting

Talbert next alleges that Supply System discriminated against him or otherwise acted improperly in editing out his colloquy with Baker from the video tape of the May 16, 1991 meeting. The implication is that the company was trying to conceal safety problems which he pointed out, cover up evidence helpful to him in this case, or both.

It is undisputed that the "official," which is to say edited, tape of the May 16 meeting did not have the colloquy in which Talbert raised his ATWS concern. However, the Supply System did retain the original tape, gave copies of both the edited and unedited versions to Talbert when he asked for them

before he resigned, and produced them both in this action. TR 143. It appears to me that if the Supply System had the evil designs Talbert suspects, it would have destroyed the original. More importantly, since the "official" version of the tape was intended for distribution for future training or for people who missed the meeting, and since the colloquy with Mr. Talbert either detracted, confused or weakened the message the management wanted to convey, I find nothing nefarious about the editing. Moreover, it appears to me that since in their exchange Talbert and Baker agreed that EOPs had to be strictly followed even,when they thought the EOPs wrong, Talbert's questioning whether EOPs had the safest answer to an ATWS emergency was irrelevant to the

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training objective of the tape. Considering the purpose of the meeting and the taping of it, I find that the Supply System had a legitimate reason for editing out Talbert's exchange with Baker. It does not, to my mind, raise the inference of impropriety.

Frequent drug testing

Mr. Talbert alleges that Supply System harassed him by making him submit to two ostensibly random drug tests in eleven days. TR 140. He contends that his two tests were not random. His "proof" of this charge is his mathematical calculation that the probability of this occurring was one chance in a thousand. TR 141. But it appears that the Supply System tested approximately 104% of its 1700 employees every year. In the absence of other evidence, I am not persuaded that the probability calculation, standing alone, demonstrates that the two tests were deliberately scheduled to harass Talbert. I conclude that Mr. Talbert has not carried his burden of persuasion on this point by a preponderance of evidence.

The Employer's lack of concern about safety

Running through the complainant's case are express and implicit suggestions that the Supply System was not as safety conscious as he thought it should have been, and that it ignored his concerns because it thought that business considerations took precedence over reactor safety.

It should be noted that this is not an action to enforce safety. Questions as to whether the Supply System was acting safely or otherwise are the province of the industry's watchdog agencies. Safety comes into play in this case only tangentially because Mr. Talbert's protected conduct raised safety questions. But it is not germane to this case whether the questions Mr. Talbert raised had merit or indeed were frivolous. The issue here is whether Mr. Talbert was discriminated against because he pursued safety, rightly or wrongly, wisely or foolishly. I have concluded that he has not carried his burden of proof that there was a causal nexus between his pursuit of safety issues and his termination and the other acts of alleged discrimination.

In fairness to Mr. Talbert, it should be noted that he laudably pursued serious scientific safety questions even after

he left the Supply System. The NRC wrote him that it appreciated his pointing out the ATWS problem, that it shared his concerns, and that it was considering a solution similar to what he proposed. CX 8. But it appears that in the end, the NRC left the

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EOPs unchanged on the ATWS point.

On the other hand, in fairness to the Supply System, it should also be noted that there is no substantial evidence in this case that the company was lax or unconcerned about safety, or that it dragged its feet about pursuing the safety issues raised by Mr. Talbert. There is credible evidence that his superiors encouraged Mr. Talbert to pursue the questions he raised. Webring had repeatedly urged Talbert to file a PER; in the end Talbert's superiors promised to run his hypothetical cases for Siemens when that was brought to their attention; and management appeared anxious to promptly investigate the safety issues he accused them of neglecting in his legal actions."[10] And there is no showing that the Supply System took any action to keep Talbert from talking to regulators or other persons outside the company lest he divulge the company's safety secrets.

* * *

My conclusions about this case, summarized in broadest strokes, are as follows. In 1991 and before, there was a basic "cultural" conflict within the company about how strictly it should follow NRC emergency directives, notably EOPs. The NRC view, accepted by the top management, was that in the panic that accompanies emergencies, there is no time to figure what is the best way to avert a disaster, and thus EOPs must be followed because they represent the collective wisdom of the entire industry and are based on the industry's experience and on unhurried studies and calculations of many experts. The dissenting view was that the engineers and operators in the control room should have the discretion to decide on the spot what is the safest course, and deviate from EOPs if they thought best. Mr. Talbert was perceived by at least some of the company executives to be the principal protagonist of this dissenting approach. When the company's top officials, under pressure from NRC, called a meeting to make clear that everyone was expected to accept the NRC position, Talbert made some comments which were construed as a challenge to the management and NRC view and something that might undermine their efforts to change the company "culture." Because these comments came from a man with a reputation as a brilliant engineer who was either the current or recent past bead of the key Reactor Group, the perceived challenge rankled among top managers because of their concern that it might lead some operators to continue to doubt the wisdom of following EOPs. But the episode did not immediately lead to any discipline. The dispute about the force of EOPs came to a head fifteen months later in the wake of the nearly disastrous

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reactor core oscillation event. NRC felt the oscillation might

have been avoided if the company strictly followed the rules. The fact that Talbert was the duty engineer in the control room during the oscillation event, and his own initial belief that the oscillation was caused by his mistakes, placed a spotlight on him and on the debate about the operators' discretion in emergencies. To avert an economic disaster to the company, perhaps even its extinction, and no doubt for the sake of their own careers, top executives, who expected to be held accountable for the oscillation, began searching for ways to.satisfy the NRC and improve the company's future performance by rooting out the lax approach to EOPs. One of the additional persistent problems which was identified as a cause of the oscillation was the longstanding friction between Mr. Talbert and his counterpart in the Fuels Group. While it was decided that the blame for the friction was not Mr. Talbert's alone, he was thought to be partially responsible for it. Moreover, his acting successor was thought to have enjoyed a smoother relationship with Fuels.[11] Thus, it was decided that Mr. Talbert had to go from the Reactor Group. But, because his technical brilliance was a great asset to the company, an effort was launched to relocate him within the company in another job where his engineering talents would be put to use, but where his perceived shortcomings as a manager and a public relations man, and his identification with the advisory EOPs position, would not add to the company's woes. However, Mr. Talbert resigned before the process of relocating him had run its course.

The evidence presented in this case, in my view, falls short of showing that Mr. Talbert's termination from the Reactor Group or that the allegedly discriminatory actions by Supply System, were causally related to his protected condUCt on May 16, 1991. Moreover, Mr. Talbert has failed to prove the occurrence of at least one of the discriminatory actions he alleges, i.e., the refusal of his transfer to the Engineering Department. I am persuaded that the Supply System's decision to end Mr. Talbert's employment in the Reactor Group, and its hesitancy to assign him to positions where he might be a company spokesman, were motivated by the company's proper, bona fide doubt about his suitability for some management positions, and a belief that his temperament made him unsuited to represent the company following the crisis after the core oscillation event. It is clear to me that because the decisions about Mr. Talbert's career in the Supply System were made after the core oscillation event, his protected conduct some seventeen months earlier played no significant role in the company's decisions. Although not forgotten, in the management's collective mind the May 16 episode

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was no more than one episode among many which led them to question Mr. Talbert's suitability for some management positions where he would be a company spokesman.

It should be noted that I have considered that the Supply System may have terminated Talbert from multiple motives, one of which was his protected conduct. However, I have concluded that even if the Supply System terminated Talbert in part because it

wanted to be rid of his persistence on the ATWS question, it would be my judgment that the Supply System has shown by clear and convincing evidence that it would have acted the same way in the absence of that consideration. I am persuaded that after the oscillation event, the company's very existence depended on it making changes in personnel and the attitude of its employees which would impress and assuage the NRC. Rightly or wrongly, but I believe sincerely, Talbert was perceived to personify the view that EOPs were advisory, a view which the NRC wanted to root out. Talbert was also earnestly perceived to be an, although not the sole, impediment to making the Fuels and Reactor groups work more harmoniously. It is my conclusion that in order to save itself after the oscillation, the company felt it had no choice but to show NRC that it was radically changing its "culture." This entailed, among other things, removing Talbert from the Reactor Group. I have concluded that the company's need to satisfy the NRC was so compelling that it would have removed Talbert from the Reactor Group even if he had never raised the ATWS issue on May 16 or later.

Lastly, I find that Mr. Talbert has not shown that the other actions of the Supply System which he believes were discriminatory or harassing were caused by his protected conduct. Moreover, some of the charges of discrimination, i.e. refusal to run a computer study, misrepresentations about the tenor of conversations, and editing of a video tape, do not appear to qualify as discriminatory acts "with respect to [Mr. Talbert's] compensation, terms, conditions, or privileges of employment" as required by the ERA to be actionable in this forum. 42 U.S.C. §5851(a); *Delcore v. Northeast Utilities*, 90-ERA-37 (ALJ June 11, 1990).

ORDER

For the above reasons, it is recommended that this complaint be dismissed.

NOTICE

This Recommended Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. **See** 55 Fed. Reg. 13250 (1990).

[ENDNOTES]

[1]
ATWS stands for Anticipated Transient Without SCRAM. TR 63.

Control rods are withdraw from the reactor core in order to bring the reactor up to full power and inserted when the reactor is being shut down. TR 63. A SCRAM is a sudden insertion of all the control rods in order to quickly shut down the reactor. TR 63. ATWS is a situation where the nuclear plant has a "transient" that requires a SCRAM, but the Operators are unable to insert the control rods into the core because of either a hydraulic or electric failure and therefore must attempt to shut down the reactor through other means. TR 63-64, 99.

[2]
Mr. Talbert does not deny that he believes EOPs should he advisory and that he made his views on this issue known. But he denies that his crew failed the NRC examination. His diary entry of December 12, 1992 says that Atkinson's group failed, but the group Talbert was with got the pumps safely tripped. CX 3.

[3]
The ATWS problem raised by Talbert had been under study, by the Emergency Procedures Committee of BWORG for some time before the May 16 meeting.

[4]
An employee's internal safety complaints to superiors are protected activities under the ERA. *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474 (3rd Cir. 1993).

[5]
Mr. Talbert's September 17, 1992 performance appraisals include the following comments:

Bob sometimes looses sight of the big picture...and is overcome by the events of the day. Bob needs to consider this as he reenters the management process.

Bob is further encouraged to work, to further develop his management skills as the staff moves more to a management mode that requires accountability to ensure success and not just continued dogged determination.

Bob will, at times, perform work for others when he does not feel they have achieved his standards in order to avoid a confrontation. This is not always in the best long term interest of the plant and Bob is encouraged to take those issues on when appropriate.

Bob could spend more energy in listening to others and what they are **not** saying. This is a difficult thing for anyone to develop and it is especially true for Bob as his thought processes operate faster than most and he often feels he has the answer before the question is asked. Work in this area may help Bob in further developing his management skills.

Bob has many natural leadership characteristics and skills....He needs to channel these abilities in new directions as he develops his management skills by learning to anticipate the broader needs of the organization partially as perceived by the regulator and become a leader in developing our relationship with the NRC.

At the end of his performance appraisal Mr. Talbert wrote: 'I felt [Webring's] comments...were insightful and accurate.'

RX RLW-3a.

[6]
Both parties, perhaps to avoid invading people's privacy, appeared very restrained in presenting evidence on the changes in the managerial ranks which followed the core oscillation.

[7]
Talbert acknowledged that after he was told he would have to leave the Reactor Group, Webring offered assistance in finding another position at the Supply System. Webring admittedly told Talbert that he could remain at Reactor Group for as long as he needed to find another job. TR 174-78, 269.

[8]
Witnesses for both sides testified, and I find, that Talbert was technically exceptionally competent. One witness described Talbert as "clearly...one of the best nuclear engineers in the industry." CX 17, p. 8. Baker and Oxsen testified that they were always interested in hearing, Talbert's scientific views because they judged him to be technically outstanding. TR 213-14, 235-36.

[9]
STAIF is a stability domain code that calculates whether the reactor will remain stable at various points of operation. TR 32.

[10]
Webring testified: "On December 10, 1992, I received a memorandum from Bob...[which] indicated that he had filed a DOL complaint and was planning on filing at least three other complaints with state or federal agencies.... The memorandum itself was silent on the reason for Bob's filing a complaint. I was concerned to know the reason so appropriate action could be taken to address any issue if that issue related to nuclear safety. I mentioned this concern to my management. It was agreed to have Bob meet with Vic Parrish...and have Vic discuss with Bob...if the Supply System needed to take action to address a nuclear safety issue...I participated in that investigation....The investigation concluded, and I think appropriately, that Bob's complaint was

without merit." RX RLW-1, pp. 12-13.

[11]
In Talbert's view, the friction between the Reactor and the Fuels Group was even worse under Atkinson. But because Webring was in a better position to judge, I feel compelled to credit Webring's conclusion that things improved under Atkinson.